No. 011099 JAN 22 2002

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In The

Supreme Court of the United States

MICHAEL ERIKSON,

Petitioner,

v.

PAWNEE COUNTY, an Oklahoma political subdivision, ex rel. BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, LARRY STUART, in his official capacity as District Attorney for Osage and Pawnee Counties, HARLAND STONECIPHER, individually and as President of the Oklahoma Sportman's Association, OKLAHOMA SPORTMAN'S ASSOCIATION, MICHAEL TURPEN, individually and as an employee and shareholder of the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC., an Oklahoma professional corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court may dismiss a civil rights complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that it lacks specificity when this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998), suggests a district court faced with such a situation should either require a reply or a more definite statement, and, further whether such action by the district court violates the Due Process Clause of the Fifth Amendment, which guarantees notice and an opportunity to be heard? Divergent circuit views on whether *Crawford-El* permits or precludes a heightened pleading standard in civil rights cases involving individual defendants make this issue ripe for this Court's consideration.

2. Whether a district court may dismiss a civil rights complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground it lacks specificity without granting Plaintiff an opportunity to amend.

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The decision of the United States Court of Appeals of which Petitioner seeks review is reported as *Erikson v. Pawnee County Board of County Commissioners*, 263 F.3d 1151 (10th Cir. 2001). The opinion also appears in the Appendix to this Petition at App. 1a. The decision of the district court is not reported and appears at App. 11a. *Erikson v. Pawnee County, et al.*, Case No. 99-CV-786-BU(M) (N.D. Okla. Aug. 21, 2000). The district court adopted the Report and Recommendation of the Magistrate Judge, issued two months earlier. *Erikson v. Pawnee County, et al.*, Case No. 99-CV-786-BU(M) (N.D. Okla. June 20, 2000). App. 14a.

STATEMENT OF JURISDICTION

Plaintiff Michael Erikson filed the present lawsuit under 42 U.S.C. § 1983, a federal civil rights statute. Jurisdiction was conferred by section 1983 and by 28 U.S.C. §§ 1331 and 1332. Mr. Erikson appealed the dismissal of his suit to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1291. The Tenth Circuit affirmed the dismissal by an Opinion issued August 23, 2001. *Erikson v. Pawnee County Board of County Commissioners*, 263 F.3d 1151 (10th Cir. 2001). Mr. Erikson did not file a Petition for Rehearing. Mr. Erikson then sought review by Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254 and Supreme Court Rules 12 and 13.

He timely files the Petition pursuant to an extension of time granted by this Court on November 13, 2001.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The **Fourth Amendment** of the United States Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The **Fifth Amendment** of the United States Constitution states as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V (emphasis added).

Section 1983 of Title 42 states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rule of Civil Procedure 12(b)(6) states as follows:

> **(b). How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may be at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

Mr. Erikson seeks review of a decision of the United States Court of Appeals for the Tenth Circuit in which the court affirmed the dismissal of his civil rights case, brought under 42 U.S.C. § 1983. *Erikson v. Pawnee County*

was he ever informed as to whom had accused him of making such a threat (App. 81a).

The legitimacy of Morganite's allegations that Mr. Gibbs threatened some unidentified person were complicated further by the testimony offered by Doug Blizzard before the North Carolina Employment Security Commission on September 19, 1997, some six months after Mr. Gibbs had been terminated. At that hearing, Mr. Blizzard testified that Mr. Gibbs had threaten Mr. Bone during the January 4th incident, (App. 78a), while another supervisor, Russell Lee, believed that it was Mr. Glenn Knight who was threatened by Mr. Gibbs. (App. 75a). Interesting enough, Mr. Cooper, the second line supervisor, testified in his deposition that Mr. Bone never informed him that Mr. Gibbs had threatened him. (App. 92a). When Mr. Blizzard was confronted with these inconsistencies in Morganite's claims as to whom Mr. Gibbs allegedly threatened, Mr. Blizzard admitted that "*apparently* some other employees came out of the woodwork for whatever reason and made comments. . ." about Mr. Gibbs. (App. 78a).

Mr. Blizzard also admitted that neither he nor any other management official for Morganite conducted any type of investigation in order to determine whether a threat had in fact been communicated. (App. 79a). Despite Mr. Gibbs denial that he threatened anyone, he was disciplined for the alleged threats of January 4, 1996.

The findings by the court inferred that prior to Mr. Gibbs' termination, he had been counseled by Morganite for his threatening behavior. The implication from this finding was that Morganite had counseled Mr. Gibbs for the threats he allegedly made on January 4th as well

as counseled him on other occasions for the same conduct.

Contrary to this finding, Morganite never informed Mr. Gibbs who it was he allegedly threatened nor was he informed when the alleged misconduct supposedly occurred on January 4th. On that occasion, Mr. Gibbs was subjected to disciplinary action without any means to challenge the allegations that he contended were fabricated. He was required to submit to a psychiatric evaluation which discredited Morganite's claim that Mr. Gibbs was a threat. During his employment with Morganite, there was never another instance where Morganite brought to Mr. Gibbs attention an issue about him threatening any employee.

As part of the discipline for the January 4th incident, Mr. Gibbs was also required to enter into a last chance agreement which required that he be subjected to personal searches. Mr. Gibbs signed this agreement, but included a three page addendum which outlined his written protest of his working conditions. This written protest pointed out that he had been subjected to a continuous atmosphere of racial discrimination at Morganite and that the agreement was a continuation of the discriminatory process. Morganite never investigated his claims nor provided him with a fair opportunity to challenge the false allegations. (App. 81a). Mr. Blizzard admitted that because of the authority of Mr. Bone as plant manager, the allegations regarding Mr. Gibbs threatening Mr. Bone were not investigated. When asked why he did not conduct an investigation, Mr. Blizzard replied, "(W)hat else am I supposed to do? It was a one on one conversation. Morgan would probably deny it, but this is the plant manager (Bone), and I have no power over him." (App. 79a).

Per this agreement, Mr. Gibbs and his personal belongings were subjected to routine searches by several management officials and co-workers over the course of the next year. (App. 85a). In February 1996, Mr. Gibbs wrote two letters to the headquarters office of Morganite in England to protest the discrimination. Mr. Gibbs never received a response to either letter.

During one of the first meetings with Mon Vonkchalee (hereinafter referred to as "Mon") in December 1996, Mr. Gibbs brought to Mon's attention the discriminatory treatment he had endured over the years from Morganite. He also discussed with Mon the objections that David Cooper had with him regarding his interracial relationship. (App. 57a).

During this meeting, Mr. Gibbs requested advance approval to use some personal leave time on the first Monday of the first three months of 1997. Mr. Gibbs informed Mon that he would take no more than four hours of leave on each day. The personnel policy afforded each employee personal paid time to use at their own discretion so long as they obtained prior approval. The use of personal paid time was commonly used by many employees at Morganite. (App. 57a-58a).

Mon agreed to the request, but asked Mr. Gibbs to report to him each Monday that personal time was to be used in order to verify the time of his arrival. On the first Mondays of January and February 1997, Mr. Gibbs took the requested time off without incident.

On February 19, 1997, Mr. Gibbs renewed his request for accommodations by submitting a letter to Mr. Blizzard (App. 50a). Mr. Gibbs did not receive a response from Morganite.

On March 3, 1997, Mr. Gibbs took two hours personal leave per the December 1996 approval and agreement Mr. Gibbs had received from Mon. When Mr. Gibbs arrived at work, he located Mon standing in front of Mr. Bone's office and reported to Mon that he had arrived per the agreement. (App. 58a-59a).

After Mr. Gibbs' termination, Mon claimed in three separate statements that Mr. Gibbs' reasons for being late were because he had a headache and his girlfriend failed to call in on his behalf. (App. 93a-99a). Mon's admission that Mr. Gibbs had in fact informed him that he was late because of the prior approval only surfaced during Mon's deposition. (App. 88a). When Mon asked Mr. Gibbs to step outside the building to discuss his late arrival, Mr. Gibbs reminded Mon of the prior approval in December 1996 and Mon responded, "oh, damn, I forgot that. (Y)eah, that's right". (App. 60a).

On Tuesday, March 4, 1997, Mon presented Mr. Gibbs with a written reprimand for being late. Mon explained to Mr. Gibbs that Roger Bone had told him to give Mr. Gibbs a second-level counseling reprimand for reporting late to work on the previous day. (App. 61a). Mr. Gibbs did not say anything in a threatening manner, but did inform Mon that he was "tired of this shit." He declined to sign the reprimand and departed the office. (App. 61a). Mon admitted that he did not believe that Mr. Gibbs was threatening him or anyone else. Mon conceded that Mr. Gibbs was upset because he thought that the issue regarding the disciplinary action was resolved, ". . . probably think (sic) that it was okay to tell somebody two months ahead of time that he was going to be off for a couple of hours, three months later or something . . ." (App. 88a). Mr. Gibbs went to his work station to retrieve his copy of the Morganite policy book and then returned to Mon's office to explain to him that the prior approval Mon gave him in December 1996 was sufficient notification to Morganite. Mon does not deny that Mr. Gibbs returned to

his office with the Morganite policy book to discuss Mon's prior approval. (App. 89a).

Mon then admitted to Mr. Gibbs that if he did not give Mr. Gibbs the disciplinary action, that Roger Bone would "have his ass in a sling." (App. 64a). After a brief discussion on the issue, Mon promised to straighten the matter out because he was in the wrong. Mon and Mr. Gibbs then shook hands and Mr. Gibbs departed. Later that day on March 4th, Mon stopped by Mr. Gibbs' workstation and told him that he had taken care of everything and patted him on the shoulder. (App. 61a-62a).

Mr. Gibbs worked his regular shift the remainder of the week without incident or complaints from any management official. However, on March 11, 1997, Doug Blizzard was informed by Mon that Mr. Gibbs had made several threatening remarks on Monday, March 3, 1997.

On March 12, 1997, Mon informed Mr. Gibbs that he had to issue him a second-level counseling statement. Mr. Gibbs response to Mon was "that's cool" and departed the room. (App. 63a). Mr. Gibbs never saw a copy of the counseling statement.

Prior to the work day ending, Mr. Gibbs ran into Mr. Bone near his break area. Mr. Gibbs and Mr. Bone had a discussion about the discipline. At the Employment Security Commission hearing, Mr. Gibbs testified as to a conversation he had with Mr. Bone as follows:

> I asked him (Bone), I asked him if Mon had mentioned to him anything about me coming in, about the advanced notice that I had given, he said that long term advance notice was not permissible. He said that, you couldn't do that and I told him that, I said well, my my policy books says otherwise,

> you know, I said show me in yours what, where that is, he said, you're a big boy, you can read, you know, he said you're a big boy, you should be able to read. (App. 84a).

In their motion for summary judgment, Morganite claimed that when Mr. Gibbs first learned about the reprimand that he left Mon's office threatening to harm Mr. Blizzard and Mr. Bone. Although Mr. Gibbs forecasted evidence that disputed this account, it was stricken from the proceeding as a result of the state law which precluded the use of ESC testimony in any other proceeding.

This evidence proved that Mr. Gibbs was not in the state of mind as described by Mon towards Mr. Bone and Mr. Blizzard. As a matter of fact, the conversation between Mr. Bone and Mr. Gibbs concluded with Mr. Bone inviting Mr. Gibbs to go to Mr. Blizzard's office to discuss his complaints about the discipline. As Mr. Gibbs departed to Mr. Blizzard's office, Mr. Bone reminded him that he would have to "dance to our (Morganite) drums" and referred to him as "Chief" when he departed. (App. 85a).

When Mr. Gibbs reported to work on March 13, 1997, he was terminated by Roger Bone without being informed of any specific details regarding who he threatened or when. Furthermore, Morganite recategorized the 1995 insubordination incident involving Bert Jenkins as a threatening action by Mr. Gibbs in an effort to taint his work record. Mr. Gibbs did not learn that he had allegedly threatened Mr. Jenkins or any of the details regarding his termination until the ESC hearing in September 1997.

The three written versions by Mon of his account of the events that transpired on March 3, 4, and 12, 1997

were prepared and signed on March 16, 1997 which was after Mr. Gibbs had been terminated. (App. 93a-99a). While Mr. Gibbs was informed that he was terminated because he had made threatening remarks, he was never provided details as to whom he allegedly threatened or when the alleged incident occurred. (App. 81a).

Following Mr. Gibbs' termination, a hearing was conducted before the Employment Security Commission (ESC) to determine Mr. Gibbs' eligibility for unemployment compensation. The controlling issue involved whether Mr. Gibbs was discharged for misconduct. During this hearing, Morganite failed to meet its burden to prove that Mr. Gibbs was guilty of threatening any employee of Morganite. Of significance was the reasons given by Morganite at the hearing were in contradiction to what was later asserted in this case. ESC granted Mr. Gibbs the relief he sought.

Mr. Gibbs filed a complaint in federal District Court alleging discrimination on the basis of race and disability in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 *et seq.*, as amended by the Civil Rights Act of 1991, the Civil Rights Act of 1866, 42 U.S.C. 1981, and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* On June 1, 2000, Morganite, Inc. filed a motion for summary judgment. In response to Mr. Gibbs' opposition to the summary judgment, Morganite filed a motion to strike all references to Mr. Gibbs' hearing taken before the Employment Security Commission Hearing in 1997.

The court granted Morganite's motion for summary judgment on October 6, 2000 and struck from the record the ESC evidence Mr. Gibbs by dismissing the case in its entirety.

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE COURT IMPROVIDENTLY GRANTED SUMMARY JUDGMENT BY INCORPORATING ADDITIONAL SUBJECTIVE STANDARDS TO THE PLAINTIFF'S BURDEN OF PROOF UNDER *McDONNELL DOUGLAS* AFTER THE PLAINTIFF HAD DEMONSTRATED THE EXISTENCE OF A MATERIAL QUESTION OF FACT, HAD FORECASTED A PRIMA FACIE CASE AND PRODUCED EVIDENCE DEMONSTRATING PRETEXT?

Mr. Gibbs forecasted sufficient evidence to establish a prima facie case of retaliation under Title VII and 1981 as stated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1877 (1973). To prove unlawful discrimination under the McDonnell Douglas framework, the employee "must carry the initial burden . . . of establishing a prima facie case, by producing evidence adequate to create an inference that an employment decision was based on a(n) (illegal) discriminatory criterion," *Teamsters v. United States*, 431 U.S. 324, 258 (1977). A prima facie case of retaliation under either Title VII or 42 U.S.C. 1981 requires a showing that the employee (1) engaged in protected activity; (2) the employer took adverse employment action against the employee; and (3) a causal connection existed between the protected activity and the adverse employment action. *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998).

Once established, the burden shifted to Morganite to "rebut the presumption of discrimination by producing evidence that the discharge of Mr. Gibbs was for a legitimate, nondiscriminatory reason." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254,

67 L.Ed.2d 207, 101 S.Ct. 1089 (1981). Assuming Morganite had in fact met their burden of production, Mr. Gibbs forecasted sufficient evidence proving pretext. *Mary's Honor Ctr. v. Hick*, 509 U.S. 502, 506-11, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993).

The court impermissibly altered this burden of proof standard when it held that Mr. Gibbs failed to show that "none of the employees at Morganite felt threatened by him." (App. 23a). In effect, the district court materially altered the McDonnell Douglas test when it placed an unfair burden upon Mr. Gibbs to prove the subjective state of mind of Morganite's employees. The primary objective of the McDonnell Douglas was to permit Mr. Gibbs to establish a prima facie case of discrimination through indirect evidence which established an inference of discrimination. The requirements of the court that Mr. Gibbs prove that he did not scare any employees or that he did not make any employee feel intimidated or threatened essentially required him to produce direct evidence of the state of mind of his co-workers which is contrary to the burden or proof standard established in McDonnell Douglas.

Mr. Gibbs' evidence that he never threatened any employee at Morganite was sufficient to avoid the summary judgment. The evidence forecasted by Mr. Gibbs as to whether he actually threatened anyone was a question of fact that should have been resolved by the fact finder. Furthermore, the requirement by the court that Mr. Gibbs prove that the exact same comments that he denied making were not causing any supervisor or other employee to feel threatened violated the requirement for establishing a prima facie under McDonnell Douglas.

To reach this decision, the court of appeals permitted the district court to substitute its view of the weight of

the evidence for the jury's view and failed to draw all reasonable inferences in Mr. Gibbs' favor. Mr. Gibbs' evidence included acts of discriminatory treatment that he encountered from his first day of employment until the day of his termination. The district court's conclusion that the evidence of discrimination by Mr. Gibbs was too remote in time was based on little to no weight being given to the evidence forecasted by Mr. Gibbs that took place within the last 18 months of his employment. (App. 29a-31a).

The district court's determination that Morganite's non-discriminatory explanation for its action was ". . . honestly described, but poorly founded . . ." represented an improper credibility determination and a clear measurement of the evidence which is contrary to the principles that a court should consider on summary judgment. The premise of Mr. Gibbs' case was that he was continuously accused of misconduct each time that he requested accommodations for his ailments or opposed the discriminatory treatment he encountered while employed with Morganite. The rejection by the court of Mr. Gibbs' evidence of pretext essentially endorsed Morganite's contention that Mr. Gibbs' had in fact threatened some of his co-workers. (App. 21a), although he consistently denied any such actions.

This evidence involved material factual circumstances that supported the very foundation of Mr. Gibbs' case and as such, should have been resolved by the fact finder and not the court. Summary judgment may not be granted unless the submission of the parties taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed.R.Civ.P.

Summary judgment should be granted only where it is "perfectly clear that no issue of fact is involved and inquiry into facts is not necessary to clarify application of the law." *McKinney v. Bd. of Trustees of Maryland Community College*, 95 F.2d 924, 928 (4th Cir. 1992).

In granting summary judgment, the court could not avoid making the impermissible factual determination that Mr. Gibbs had in fact communicated threats. This Court has outlined the standards for judgment as a matter of law under Rule 56 with the courts being required to review all of the evidence in the record, *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 487, 89 L.Ed.2d 538, 106 S.Ct. 1348 (1986) draw all reasonable inferences in favor of the nonmoving party, but make no credibility determinations or weigh any evidence, *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-555, 108 L.Ed.2d 504, 110 S.Ct. 1331 (1990). The latter functions, along with the drawing of legitimate inferences from the facts are for the jury, not the court. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L.Ed.2d 202, 106 S.Ct. 2500 (1986). A material fact is in dispute when its existence or non-existence could lead a jury to different outcomes. *Id.* A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the non-moving party. *Id.* Thus, although the court should review the records as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to follow. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 130, 120 S.Ct. 2097, 68 U.S.L.W. 4480, 82 Fair. Empl. Prac. Cas (BNA) 1748. (June 12, 2000).

Contrary to these line of cases, the court made the factual determination that Mr. Gibbs had threatened

employees at Morganite and that the employer acted reasonable when it terminated Mr. Gibbs. From this premise, the court then required Mr. Gibbs to prove that his alleged threatening actions did not cause the employees to feel intimidated. Mr. Gibbs' evidence supported a clear inference that his termination was a pretext by Morganite and that their true reason for disciplining Mr. Gibbs and eventually terminating him was his repeated statements in opposition to the discrimination that he felt existed. Rather than the court disregarding the evidence favorable to Morganite, the court impermissibly weighed the evidence presented by Morganite against the evidence submitted by Mr. Gibbs.

The evidence forecasted by Mr. Gibbs proved that from the time he was first employed by Morganite, he was subjected to a racially hostile working environment. A reasonable jury could have concluded that discriminatory practices of this nature continued and that the adverse actions taken against Mr. Gibbs while he was employed at Morganite were a continuation of the discrimination.

He was subjected to demeaning searches of his person, his personal effects and even his car. He was constantly subjected to a steady barrage of opprobrious (racial and ethnic) comments from his coworkers and superiors. Mr. Gibbs stated that the harassment took all forms of physical and mental tactics such as the incident when Roger Bone drew a picture of the Washington Monument on a piece of paper and sectioned it in a manner to demonstrate a KKK hierarchy at Morganite (App. 48a).

Morganite admitted that the accusations that Mr. Gibbs threatened any employees were never investigated nor was Mr. Gibbs provided a fair opportunity to grieve or challenge the allegations. (App. 81a). The evidence as

forecasted by Mr. Gibbs supported a clear inference that each time Mr. Gibbs opposed actions he felt were unfair or discriminatory, uncorroborated allegations from Morganite would surface that Mr. Gibbs was a threat and his issues of discrimination would be subordinated. A reasonable jury could infer that this was a tactic by Morganite to stifle Mr. Gibbs' attempts to oppose their discriminatory practices.

In considering whether there was sufficient evidence of discrimination to support a claim of retaliation, the court failed to take into account the February 19, 1997 letter from Mr. Gibbs to Morganite requesting accommodations for his ailments. Although this letter was presented to Mr. Blizzard only three weeks before the allegations by Morganite surfaced that Mr. Gibbs made the threatening remarks that resulted in his discharge, (App. 32a) the court deemed this evidence as "unpersuasive in light . . ." of Mr. Gibbs previous requests for accommodations.

The district court impermissibly substituted its perspective for that of a jury when the court declined to consider the February 19th letter as a causation of Mr. Gibbs' termination. The court's reasoning that Mr. Gibbs had made previous complaints of discrimination encroached upon the principles that the drawing of legitimate inferences from the facts are for the jury, not the court. *Anderson, Id.* A reasonable jury could find that Morganite's previous failures to respond to Mr. Gibbs' requests for accommodations represented a pattern of discrimination which motivated their decision to terminate him after his last request.

The very fact that Mr. Gibbs reported to work late on the first Monday of January and February 1997 *without incident,* coupled with the letter being delivered

a few weeks before he was terminated created a sufficient basis for a reasonable jury to infer that Morganite's effort to discipline Mr. Gibbs for being late and subsequently terminating him were pretextual. The court did not give sufficient weight to Mr. Gibbs' prima facie evidence and evidence of pretext, and it failed to draw all reasonable inferences in Mr. Gibbs' favor. For example, the court noted that Mr. Gibbs' evaluations indicated a lack of cooperation. (App. 7a-8a). Again, the district court made this finding while totally disregarding the evidence forecasted by Mr. Gibbs that his rating under the "lack of cooperation" element was lowered to retaliate against him for his opposition to discrimination.

The district court also noted in its finding that Mr. Gibbs was "counseled several times for engaging in threatening conduct." (App. 9a). This finding by the court represented the fundamental error that the court committed by impermissibly weighing the evidence as forecasted by Mr. Gibbs and Morganite. Inferences that should have been drawn in favor of Mr. Gibbs as the nonmovant, were instead concluded to the advantage of Morganite.

While Mr. Gibbs was employed by Morganite, he was informed by Morganite only one time in January 1996 that he had ever threatened an employee. As noted earlier, on that single occasion Mr. Gibbs was not counseled, but simply informed of the allegations and directed to sign a compromise agreement or he would be terminated. The court concluded that Mr. Gibbs had been counseled about the alleged threatening behavior on multiple occasions. (App. 9a). On that one occasion, Mr. Gibbs' concerns were that he was never informed of the specific allegations as to what he allegedly stated

or whom he had threatened until after he was discharged. In making such a ruling, the court essentially gave little weight to Mr. Gibbs' strong denials of the allegations by Morganite that he threaten anyone and his repeated requests for an opportunity to challenge the allegations.

The evidence as forecasted by Mr. Gibbs proved that he did not threaten Mr. Bone nor any other employee. Furthermore, the forecasted evidence proved that not only did Morganite fail to investigate the allegations against Mr. Gibbs, the company was unable to determine among their own managers exactly who it was that they were accusing Mr. Gibbs of threatening. Mr. Cooper said it was two employees. Mr. Blizzard claimed it was a third employee, and Mr. Gibbs' evidence was that he never threatened anyone. In light of the central question being whether Mr. Gibbs did in fact threaten anyone, it was error for material issues such as this one not to be resolved by the fact finder.

Despite Mr. Gibbs' evidence that threats were not made and that he was never informed that he had threaten anyone until after he was terminated, the court gave impermissible weight to Morganite's claim that Mr. Gibbs was informed by both Roger Bone and Doug Blizzard that he was terminated for threatening management officials. The district court overlooked the forecasted evidence that Mr. Gibbs was informed of the reasons for his discharge only months *after* he was terminated and the fact that he was afforded no opportunity to protest his discharge.

When an employee provides sufficient evidence for the fact finder to reject the nondiscriminatory explanation offered by the employer, not only may the fact finder continue to infer discrimination from the prima facie

evidence, but it now has additional evidence from which it may reasonably infer discrimination. "As a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988). The evidence forecasted by Mr. Gibbs demonstrated that Morganite changed their story in January 1996 about who Mr. Gibbs allegedly threaten on the single occasion that he was told that he had threatened someone. Mr. Blizzard testified that Mr. Gibbs had threaten Mr. Bone. (App. 78a). Mr. Gibbs denied that he threatened Mr. Bone, while another supervisor, Russell Lee, believed that it was Mr. Glenn Knight who Mr. Gibbs had threatened. (App. 75a). Interesting enough, Mr. Cooper, the second line supervisor, testified that Mr. Bone never informed him that Mr. Gibbs threatened him. (App. 92a).

Morganite's apparent inconsistency as to whom, if anybody, Mr. Gibbs allegedly threatened goes to the credibility of their story and created the clear inference that they were making the entire matter up. Based on the sheer number of inconsistencies in Morganite's story, a reasonable jury could infer that discrimination was their true motive in discharging Mr. Gibbs.

Summary judgment is only appropriate where there are no disputed issues of material fact "and inquiry into the facts is unnecessary to clarify the application of the law." *Hagvistola v. Community Fire Co.*, 6 F.3d 211, 214 (4th Cir. 1993). Morganite claimed that Mr. Gibbs stormed from the building in a crazed state searching to harm Mr. Bone and Mr. Blizzard was totally the factual opposite of Mr. Gibbs' account of the same event. Mr. Gibbs'

forecasted evidence was that Mr. Bone *in fact* was the last person Mr. Gibbs spoke to prior to departing the tool room area. It would not have been unreasonable for a jury to conclude that the events occurred as Mr. Gibbs forecasted and that after he spoke with Mr. Bone, that Mr. Gibbs took Mr. Bone's advice and went to Mr. Blizzard's office to discuss the proposed disciplinary action against him.

Mr. Gibbs may demonstrate pretext by showing "either that a discriminatory reason more than likely motivated the employer's proffered explanation or . . . that the employer's proffered explanation is unworthy of credence." *Hardy v. S.F. Phosphates L.C.*, 185 F.3d 1076 (10th Cir. 1999). The pertinent question to determine pretext is not whether the employer was right to think the employee engaged in misconduct, but whether that belief was genuine or pretextual." *Id.* at 1080.

A prima facie case of discrimination, combined with sufficient evidence for a trier of fact to believe the defendant's legitimate, nondiscriminatory reason for its decision, is sufficient as a matter of law to show intentional discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, Id. Morganite admitted that they did not investigate any of the allegations that were made against Mr. Gibbs. Whether Morganite's inactions were reasonable should also have been determined by the fact finder.

Once the allegations were made that Mr. Gibbs threatened an unidentified employee, Morganite imposed discipline upon Mr. Gibbs without making any reasonable attempt to determine whether he committed the alleged offense. Morganite's failure to make any fair or reasonable determination about what actually transpired represented a total failure on their part to act in good faith.

Morganite's acted in bad faith by failing to initiate some type of investigation relates back to when Mr. Gibbs was accused of threatening Roger Bone in 1996. A reasonable investigation at that time would have proven that Mr. Bone was not threaten and brought into question the discriminatory motives of those making these allegations.

Morganite should not have been permitted to claim "good faith" after they deliberately refused to investigate the allegations of discrimination by Mr. Gibbs and refused to provide him with an opportunity to challenge the false allegations that he had threatened anyone. Mr. Gibbs was entitled "to have the credibility of his evidence as forecasted assumed, his version of all that is in dispute accepted, [and] all internal conflicts resolved favorably to him." *Miller v. Leathers,* 913 F.2d 1085, 1087 (4th Cir. 1990). At this stage, the court is not required to weigh the evidence nor try to determine the truth of the matter, the court's sole duty is to determine whether there is a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.,* 447 U.S. 242, 259, 106 S.Ct. 22505, 91 L.Ed.2d 202 (1986).

With each inference being drawn against Mr. Gibbs, he could not meet his burden under Rule 56 by forecasting evidence that he did not threaten any employee. A modified version of pretext-plus has been created which required Mr. Gibbs to prove what the state of mind was of those he allegedly threatened.

Accordingly, this Court should vacate the decision below and remand this case for trial.

II.

WHETHER A STATUTORY PRIVILEGE UNDER NORTH CAROLINA GENERAL STATUTE 96-(t)(5) CAN PRECLUDE THE INTRODUCTION OF PLAINTIFF'S EVIDENCE OF PRETEXT IN A TITLE VII CASE?

As part of Mr. Gibbs' evidence to prove pretext, he introduced the testimony offered by Doug Blizzard before the North Carolina Employment Security Commission on September 19, 1997, some six months after Mr. Gibbs had been terminated. At that hearing, Mr. Blizzard testified that Mr. Gibbs had threaten Mr. Bone during the January 4th incident. (App. 86a). Another supervisor, Mr. Russell Lee, testified in his deposition that Glenn Knight was the person who had been threatened. (App. 75a). This evidence proved that Morganite did not act in good faith when it disciplined Mr. Gibbs because Morganite had no reasonable belief at that time as to who, if anyone, had made such a claim.

Furthermore, Mr. Gibbs sought to introduce other evidence showing that on the day before he was discharged, he had a conversation with Mr. Bone at his workstation and that Mr. Bone had instructed Mr. Gibbs to go to personnel to discuss his disciplinary actions with Mr. Blizzard. Morganite presented no evidence to contradict this evidence. This evidence was in stark contrast to Morganite's claim that Mr. Gibbs' stormed from the building searching for Mr. Bone and Mr. Blizzard and threatening to harm them.

The court granted Morganite's request pursuant to Rule 12(f) of the Federal Rules of Civil Procedures to strike from the record and not consider the ESC transcript as part of the summary judgment. The court held that the ESC evidence forecasted by Mr. Gibbs was

redundant and in any event stricken pursuant to the statutory privilege under North Carolina General Statute 96(t)(5). (App. 14a).

The court held it must balance the interest behind the absolute privilege of Section 96(t)(5) of the North Carolina General Statutes against the countervailing federal interest of Title VII. The case law in the Fourth Circuit on this issue is in direct conflict and are not of one accord. The court relied upon *Hartsell v. Duplex Prod., Inc.*, 895 F. Supp. 100, 102-03 (W.D.N.C. 1995) in ruling that the state privilege outweighed Mr. Gibbs' federal rights under Title VII and the other federal civil rights statutes. (App. 14a).

Hartsell is in contrast with *Odinkemelu v. Consolidated Stores Corporation*, No. 2:95CV00826, 1998 U.S. Dist. LEXIS 8150 (M.D. N.C. April 3, 1998) (unpublished opinion; Appendix D), where that court weighed the "historical and policy considerations underlying the state privilege and concerns of comity against the federal interest at stake." *Id.* In so doing, that court held that the federal interest in enforcing the protections of Title VII controlled and that the ESC testimony in that case was not privileged.

The reasoning found in the Odinkemelu case provides a more coherent assessment as to how the various competing interests should be balanced. Most notably, this decision acknowledges the mandates of the legal precedent established by this Court as to the allocation and standards for the burden of proof for a Title VII plaintiff. The Odinkemelu decision essentially left intact this Court's pronouncements as to what evidence a Title VII plaintiff will have available to meet the legal burdens under *McDonnell Douglas.*

In this case, the effects of this holding severely prejudiced Mr. Gibbs by the exclusion of critical evidence of pretext and evidence to support his prima facie case. Mr. Gibbs carried the burden under Title VII and the other civil rights statutes to not only establish a prima facie case, but to also be prepared to go forward with evidence to prove pretext. The ruling by the court severely hampered Mr. Gibbs' ability to demonstrate the obvious inconsistencies and fabrications in Morganite's articulated reason for Mr. Gibbs' dismissal.

As an initial matter, any time a person takes an oath and gives testimony, they should always be required to tell the truth. Morganite's testimony before the ESC was under oath and offered to explain their reasons for terminating Mr. Gibbs. Furthermore, testimony under oath should always be subject to a credibility check both during and after the testimony is taken. The truth is the truth regardless of the forum and Morganite should not have been permitted to use the state privilege to shield themselves from their own fabricated statements.

The exclusion of this evidence permitted Morganite to revise their reasons for terminating Mr. Gibbs without prejudice. The reasons given before the ESC were rejected and thus the court ruling permitted them to revise the basis for their actions without fear of their revisions being presented to a jury.

Morganite's premise is that Mr. Gibbs became so upset about the March 11th discipline that he departed in an angry manner from his workstation threatening to harm Mr. Bone and Mr. Blizzard. However, the uncontroverted testimony of Mr. Gibbs was that he had a conversation with Mr. Bone about his discipline without incident. (App. 84a). This evidence is in total contradiction with Morganite's claims that Mr. Gibbs stormed from the building searching for Mr. Bone. Furthermore, the need

for Morganite to investigate the allegations that Mr. Gibbs threatened an employee in January 1996 is evident by the fact that the management of Morganite is totally unclear as to who, if anyone, was threatened by Mr. Gibbs.

Morganite claimed that the participants at the ESC hearing did not expect their testimony to appear in a subsequent employment discrimination action. Mr. Gibbs had repeatedly complained to Morganite that he would pursue an EEOC charge if the discriminatory practices directed toward him were not abated. Furthermore, as Mr. Gibbs filed his EEOC charge in July 1997, two months before the September 1997 ESC hearing, Morganite cannot realistically claim that it did not anticipate that their testimony at the ESC hearing might eventually be part of a Title VII investigation or trial.

More to the point, the probative value of the testimony offered at the ESC hearing far outweighs any interest created by this state privilege. Each of the civil rights statutes that Mr. Gibbs is pursing requires him to maintain the burden of proof throughout the entire process. Mr. Gibbs must satisfy the three-step proof scheme established in *McDonnell Douglas Corp. v. Green,* Id. to prevail on all of his discrimination claims. Mr. Gibbs' ability to meet this burden under Title VII was severely impeded by the imposition of this privilege.

This Court has mandated that Mr. Gibbs must initially establish, by a preponderance of the evidence, a prima facie case of discrimination. Once established, the burden then shifts to Morganite to "rebut the presumption of discrimination by producing evidence showing a legitimate, nondiscriminatory reason for their actions. *Texas Dep't of Community Affairs v. Burdine, Id.* If Morganite met this burden of production, Mr. Gibbs

maintained the ultimate burden of proving pretext. *Mary's Honor Ctr. v. Hick, Id.* The very weight of the legal burden of proof that this Court has placed upon Mr. Gibbs substantially outweighed the privilege that the state statute is seeking to impose.

The defendants argued below that the issues and allegations peculiar to federal employment discrimination laws are not investigated, evaluated, or discussed at ESC hearings. However, in Mr. Gibbs' ESC hearing, the factual issue as to whether Morganite concocted bogus reasons for discharging Mr. Gibbs was the precise issue that was before the ESC hearing official. Morganite defended their justifications for firing Mr. Gibbs by introducing substantial evidence that Mr. Gibbs had a pattern of threatening behavior which resulted in his last chance agreement in January 1996 and his eventual termination in March of 1997. The same exact issue is present in this case.

A reasonable jury could infer that Mon's initial deception about Mr. Gibbs' explanation for being tardy was accomplished solely to disguise Morganite's objections to Mr. Gibbs' continued statements in opposition to the discrimination he was experiencing. When Mon's testimony at his deposition is compared with his ESC testimony, a reasonable jury could conclude that the decision to terminate Mr. Gibbs was a pretext.

To prove pretext in this case, Mr. Gibbs must show that the allegations that he threatened any Morganite employee were concocted in order to justify his discharge for articulating opposition to the discriminatory practices he encountered at Morganite. Mr. Gibbs must show that Morganite's proffered explanation that he was threatening other employees is unworthy of credence. *Tuck v. Henkel Corp.*, 973 F.2d 371, 374-75 (4th Cir. 1992), cert. denied, 507 U.S. 918, 122 L.3d.2d 671, 113

S.Ct. 1276 (1993). To make this demonstration, Mr. Gibbs demonstrated that as between his explanation and Morganite's, his race, his opposition to discrimination and/or his disabilities were the more likely reasons for his dismissal, or that Morganite's proffered explanation is simply unworthy of credence." *Tuck*, 973 F.2d at 375.

In response to the summary judgment motion in a Title VII case, it is Mr. Gibbs who must come forward with sufficient evidence demonstrating that he can in fact prove each element of his claim and that a genuine issue of fact exists. While there exists sufficient evidence in the depositions to support each claim that is being pursued by Mr. Gibbs, the clearest example of pretext is shown by the contradictions made by Morganite at the ESC hearing. Mr. Gibbs is entitled "to have the credibility of his evidence as forecast[ed] assumed, his version of all that is in dispute accepted, [and] all internal conflicts resolved favorably to him." See *Miller v. Leathers*, Id.

The exclusion of this evidence denied Mr. Gibbs a fair opportunity to produce evidence in support of his prima facie case and to prove that the articulated reasons by Morganite were a pretext. Rule 56 required Mr. Gibbs to come forward with evidence in response to the summary judgment motion filed by Morganite. Furthermore, this Court has repeatedly recognized the obligation of a Title VII plaintiff to come forward with sufficient evidence to support a prima facie claim of discrimination as well as evidence of pretext.

Due process is compromised when Mr. Gibbs was essentially precluded from meeting his burden under either Rule 56 or Title VII as a result of state privilege being imposed. The evidence from the ESC hearing is

compelling evidence that clearly outweighs the state privilege interest.

In the context of Title VII litigation, it is absolutely essential that a plaintiff be permitted to impeach the "articulated non-discriminatory reason" that the defendant brings forward. Morganite should not have been permitted to alter or abandon their initial reason for terminating Mr. Gibbs after suffering an adverse decision before the ESC. This is especially true in a case such as this one where Mr. Gibbs was never made aware of the reason that he was terminated until the ESC hearing. An employer should not be allowed special forums in which to audition viable reasons for terminating an employee.

Accordingly, this Court should reverse the court of appeals' decision which struck the pretext evidence pursuant to the statutory privilege and to remand the case for trial.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should be issued to review the decision of the United States Court of Appeals for the Fourth Circuit and ultimately, to vacate and reverse and remand the case to the District Court for trial.

This the 28th day of December, 2001.

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